INDEX

	Page
INTRODUCTION	2
I. RESPONDENTS HAVE NOT SHOWN THAT THE FIRST AMENDMENT COMPELS THE RESULT THEY SEEK	4
A. Respondents Have Failed To Establish the "State Action" Necessary To Invoke Application of the First Amendment	4
B. Respondents Have Failed To Establish the Existence of or Need for a First Amendment Right To Purchase Advertising Time for Partisan Announcements	8
C. The Refusal of Broadcast Licensees To Sell Advertising Time for Partisan Announcements Does Not Constitute an Unconstitutional Discrimination Against Speech on Public Issues	12
D. Respondents Have Not Rebutted the Showing by Petitioners that a Right of Paid Access Would Interfere with the Public's Interest in Being Informed, Favor the Affluent, and Lead to a Major Increase in Government Regulation of Speech and the Press	15
E. There Is No Basis for DNC's Attempt To Extend the Court of Appeals' Holding to Program Time	18
II. CONTRARY TO DNC'S CONTENTION, THE COMMUNICATIONS ACT DOES NOT REQUIRE BROADCASTERS TO SELL TIME FOR DISCUSSION OF CONTROVERSIAL PUBLIC ISSUES	21

INDEX—Continued

Page

A. DNC Is in Error in Suggesting that the Commission Has Here Departed from its Long-Standing Interpretation of the Public Interest Standard of the Act 22

B. The Legislative History of the Communications Act Lends No Support to DNC's Position 30

CONCLUSION 37

CITATIONS

Cases:

Amalgamated Food Employees Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) 6

Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) 21

Banzhaf v. *FCC*, 132 U.S. App. D.C. 14, 405 F. 2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969) 28

Brandywine-Main Line Radio, Inc. v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1181, decided Sept. 25, 1972) 13, 14

Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) 5

Democratic National Committee v. *FCC*, —— U.S. App. D.C. ——, 460 F.2d 891 (1972), *petition for cert. pending* (Oct. Term 1972, No. 71-1405) 9

Farmers Educ. & Coop. Union v. *WDAY, Inc.*, 360 U.S. 525 (1959) 24

FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 27

George Moore Ice Cream Co. v. *Rose*, 289 U.S. 373 (1933) 21

Grayned v. *City of Rockford*, —— U.S. ——, 92 S. Ct. 2294 (1972) 14

CITATIONS—Continued

	Page
Irvis v. *Scott*, 318 F. Supp. 1246 (M.D. Pa. 1970), *rev'd sub nom. Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972)	4
Lloyd Corp. v. *Tanner*, —— U.S. ——, 92 S. Ct. 2219 (1972)	6, 7, 8
Marsh v. *Alabama*, 326 U.S. 501 (1946)	6
Massachusetts Universalist Convention v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950)	27
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956)	33
McIntire v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946)	26
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972)	4, 5, 6, 8
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943)	9
National Woodwork Mfrs. Ass'n v. *NLRB*, 386 U.S. 612 (1967)	33
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	11
NLRB v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964)	33
Police Department v. *Mosley*, —— U.S. ——, 92 S. Ct. 2286 (1972)	14
Public Utilities Comm'n v. *Pollak*, 343 U.S. 451 (1952)	5, 6
Pulitzer Pub. Co. v. *FCC*, 68 App. D.C. 124, 94 F.2d 249 (1937)	27
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969)	9, 17, 20, 21, 27, 28
Regents of New Mexico College of Agricultural & Mechanic Arts v. *Albuquerque Broadcasting Co.*, 158 F.2d 900 (10th Cir. 1947)	27
Scales v. *United States*, 367 U.S. 203 (1961)	21
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)	33

CITATIONS—Continued

Page

Smothers v. *CBS*, C.D. Cal. No. 69-1898-AAH, decided Sept. 18, 1972 8
United States v. *Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1944) .. 10
Valentine v. *Chrestensen*, 316 U.S. 52 (1942) 14

ADMINISTRATIVE DECISIONS AND REPORTS:

Albuquerque Broadcasting Co., 3 Pike & Fischer R.R. 1820 (1946) 24, 26
Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 576 (1964) 18
Boalt Hall Student Ass'n, 20 F.C.C.2d 612 (1969) .. 29
City of Jacksonville, 21 F.C.C. 334 (1956) 23
Columbus Broadcasting Co., 18 Pike & Fischer R.R.2d 684 (1970) 19
Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283 (1970) 13
Committee of One Million Against Admission of Red China to the United Nations, 33 F.C.C.2d 545 (1971) 19
Democratic State Central Committee of California, 19 F.C.C.2d 833 (1968) 29
Homer P. Rainey, 11 F.C.C. 898 (1947) 23, 24
Letter to Albert H. Kramer (Back Alley Theatre), 25 F.C.C.2d 705 (1970) 31
Letter to Hon. Harley O. Staggers, FCC 71-643, June 21, 1971 10
Letter to Judy Collins, 31 F.C.C.2d 848 (1970) 31
Letter to Rep. Harsha, 31 F.C.C.2d 847 (1971) 31
Letter to Rep. Ottinger, 18 Pike & Fischer R.R.2d 1031 (1970) 29, 31
Letter to Tracy A. Westen, dated July 19, 1972 31
Letter to Women's Strike for Peace, dated Nov. 25, 1965 29
Loyola University, 12 Pike & Fischer R.R. 1017 (1956) 23

CITATIONS—Continued

	Page
Mayflower Broadcasting Corp., 8 F.C.C. 333 (1940)	24, 25, 28
Mrs. Madalyn Murray, 40 F.C.C. 647 (1965)	29
Mrs. Margaret L. Scherbina, 21 F.C.C.2d 141 (1969)	29
Multimedia, Inc., 18 Pike & Fischer R.R.2d 687 (1970)	19
Notice of Inquiry, Docket No. 19260, 30 F.C.C.2d 26 (1971)	8
Public Service Responsibility of Broadcast Licensees (1946)	25, 26
Robert Harold Scott, 11 F.C.C. 372 (1946)	23, 24, 28
Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949)	18, 22, 27, 28, 29
Sam Morris, 11 F.C.C. 197 (1946)	23, 24, 28
Sta-Shine Prods. Co. v. *Station WGBB*, 188 I.C.C. 271 (1932)	33
United Broadcasting Co., 10 F.C.C. 515 (1945)	23, 24, 25, 26, 27, 28, 29

STATUTES AND CONSTITUTIONAL PROVISIONS:

U.S. Constitution, First Amendment	*passim*
Radio Act of 1927, 44 Stat. 1162 (1927):	
Section 14	33
Section 29	31
Communications Act of 1934, 47 U.S.C. § 151, *et seq*:	
Section 3(h)	35
Section 304	7
Section 312	36
Section 315	9, 36
Section 317	26
Section 326	30, 31, 35, 36
Federal Election Campaign Act of 1971, 86 Stat. 3 (1972):	
Section 103(a)(2)	36

CITATIONS—Continued

Page

LEGISLATIVE MATERIALS:

67 CONG. REC. 5480 (1926) 32
67 CONG. REC. 5483 (1926) 34
67 CONG. REC. 5484 (1926) 32, 33, 34
67 CONG. REC. 5491 (1927) 33, 34
67 CONG. REC. 12501-05 (1926) 33, 34, 35
67 CONG. REC. 12615 (1926) 31
68 CONG. REC. 2567 (1927) 33, 34, 35
68 CONG. REC. 2570-80 (1927) 33, 34
68 CONG. REC. 2869-70 (1927) 7
68 CONG. REC. 2872 (1927) 7
78 CONG. REC. 10327-28 (1934) 36
Hearings on S. 1 & S. 1754 Before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. (1926) 31
Hearings on H.R. 5589 Before the House Committee on the Merchant Marine & Fisheries, 69th Cong. 1st Sess. (1926) 32
H.R. REP. No. 752, 92d Cong., 1st Sess. (1971) 36
S. DOC. 200, 69th Cong., 2d Sess. (1927) 31
S. REP. No. 580, 92d Cong., 1st Sess. (1971) 36
S. REP. No. 772, 69th Cong., 1st Sess. (1926) 31

MISCELLANEOUS:

J. BURNS, THE LION AND THE FOX (1956) 12
R. EVANS & R. NOVAK, NIXON IN THE WHITE HOUSE (1972) 12
Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972) 7
W. RIVERS, THE OPINION MAKERS (1965) 12
Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967) .. 7
W. SMALL, POLITICAL POWER AND THE PRESS (1972) 12
T. SORENSEN, KENNEDY (1965) 12
L. WHITE, THE AMERICAN RADIO (1947) 23, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,
v.
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.
Petitioner,
v.
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER COLUMBIA BROADCASTING SYSTEM, INC.

INTRODUCTION

In their briefs to this Court, respondents Democratic National Committee ("DNC") and Business Executives' Move for Vietnam Peace ("BEM") both support the court of appeals' constitutional holding, but DNC—perhaps recognizing the weakness of the constitutional claim—places primary reliance on its argument that the Communications Act creates a requirement of paid access.

Respondents' constitutional claim must be judged in the context of the heavy burden they bear. The question in this case is not whether Congress and the Commission could, if they chose, adopt a regulatory scheme requiring the sale of advertising time for partisan announcements, or whether that scheme would be desirable, workable, or in the public interest. Rather, the issue is whether the Constitution compels Congress and the Commission to impose a system which both have rejected. What the court of appeals did, and what respondents are asking this Court to do, is to place Congress and the Commission in a constitutional straitjacket, obligated for all time to include a requirement of paid access as part of the regulatory scheme.

DNC and BEM have not met their burden. They have not demonstrated that action by a broadcaster is the equivalent of action by the state. They have not demonstrated that the regulatory system devised by Congress and the Commission results in an unconstitutional discrimination against speech on public issues or the exclusion of partisan speech. Far from discriminating against views on public issues, the present regulatory system accords such views a preferred position and provides extensive opportunities for direct expression of views by partisans.

Nor has DNC succeeded in its resurrection of the argument—which the court below specifically declined to adopt

and which BEM has abandoned in this Court—that the Communications Act requires the result it seeks. DNC's statutory claim cannot be reconciled with the language of the statute, its legislative history, or the administrative and judicial decisions interpreting it.

I. RESPONDENTS HAVE NOT SHOWN THAT THE FIRST AMENDMENT COMPELS THE RESULT THEY SEEK.

A. Respondents Have Failed To Establish the "State Action" Necessary To Invoke Application of the First Amendment.

The opinion of the court below rested squarely on a holding that the action of broadcasters in declining to sell time for partisan announcements constituted "state action" directly subject to constitutional restraints.[1] Respondents in this Court necessarily make a similar argument. For the reasons stated in our opening brief,[2] the court of appeals' holding on the state action issue cannot be sustained. Two recent decisions of this Court substantially reinforce this conclusion.

Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972), involved the question of whether the Fourteenth Amendment applied to the action of a state liquor licensee—the Moose Lodge—in refusing service to a black guest of a member of the Lodge. The Lodge could not serve liquor without its state license; and the statutory scheme regulating the issuance of such licenses was a comprehensive one embodying state supervision of virtually all aspects of the licensee's business.[3]

The Court held that this extensive regulatory scheme was insufficient to invest the licensee's discriminatory action with a governmental character. "Our holdings indicate," the Court stated, "that where the impetus for

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[1] App. 455-64.

[2] CBS Br. 47-55.

[3] A detailed description of the Pennsylvania regulatory scheme is set forth in the decision of the three judge district court in the case. *Irvis* v. *Scott*, 318 F. Supp. 1246, 1248-50 (M.D. Pa. 1970).

the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition." [4]

In announcing this test, the Court carefully distinguished two cases relied on by respondents and the court below in this case—*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952). *Burton*, the Court stated, turned on the fact that the government had become involved in a "symbiotic relationship" with the private lessee in the state-owned building and thus became a joint participant in its discriminatory action. 407 U.S. at 172-73, 175. By contrast, in *Moose Lodge*, the Court found that the state licensing scheme, though detailed, did not make the state a joint participant in the club's discriminatory action. 407 U.S. at 175. So, too, the Court found that the *Pollak* case requires a finding of state action only where the government has "affirmatively approved the practice of the regulated entity after full investigation." 407 U.S. at 175-76 n.3. No such approval or endorsement was found in *Moose Lodge*. *Id.*

Moose Lodge clearly governs this case. Here, as in *Moose Lodge*, there is a detailed licensing scheme, but not the "joint participation" and "symbiotic relationship" critical to the result in *Burton*.[5] Here, as in *Moose Lodge*, the regulatory agency has tolerated, not affirmatively approved, the licensee's action. There has been no affirmative finding by the Commission that a licensee policy of refusing to sell advertising time for partisan announcements serves the public interest. Rather, the Commission has merely declined to require licensees generally to sell ad-

[4] 407 U.S. at 173.

[5] In the programming area, the separation between the Commission and the licensee is particularly clear. The Communications Act is founded on the premise that the broadcaster, not the government, selects program material. See CBS Br. 47-48, 52.

vertising time for partisan announcements, while making clear that licensees are free to make such sales if they choose.[6] Thus here, as in *Moose Lodge*, state action is lacking.

DNC suggests, however, that whatever the impact of this Court's decision in *Moose Lodge*, DNC's position on state action is supported by another recent decision of the Court: *Lloyd Corp.* v. *Tanner*, —— U.S. ——, 92 S. Ct. 2219 (1972).[7] There the Court held that, absent special circumstances, a privately owned shopping center need not permit access to its premises for political handbilling. DNC's efforts to find comfort in the *Lloyd* decision are difficult to fathom. In fact *Lloyd* further undermines the state action holding of the court below, by limiting two cases on which that court relied—*Marsh* v. *Alabama*, 326 U.S. 501 (1946), and *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).[8]

Lloyd makes clear that those cases announced no general principle that because a forum is appropriate for communication or is open to persons desiring to transact commercial business, it is therefore subject to the constitutional limitations applicable to the government.[9] To

[6] App. 265. In its decision in the *DNC* case, the Commission took note of the fact that ABC and NBC were willing to sell time to DNC under certain circumstances App. 248, 251, 255. The multitude of broadcast stations and the diversity of their policies on the sale of time is in sharp contrast to the situation in *Pollak*, where the utility commission's approval of the bus company's policy meant that all bus riders in the city would be subject to that policy.

[7] DNC Br. 72.

[8] Judge Wright also relied on the district court's decision in the *Lloyd* case (308 F. Supp. 128 (D. Ore. 1970)), a decision that has now been reversed by this Court.

[9] Respondents apparently believe that the *Lloyd* case denied a right of access to shopping centers on the ground that they were not appropriate places for the communication of ideas. By contrast, respondents suggest, the broadcast medium is peculiarly appropriate

the contrary, *Lloyd* held that a shopping center does not "lose its private character merely because the public is generally invited to use it for designated purposes." [10] So here the broadcaster has not lost his private and nongovernmental character simply because commercial advertisers are allowed to present product advertisements or because discussion of controversial issues is presented in news and public affairs broadcasts.[11]

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for the communication of ideas. DNC Br. 50-51, 72; BEM Br. 78. *Lloyd* rested on no such finding. The shopping center was by its very nature clearly a forum suitable for communication, and the record showed that the shopping center had been used for parades, patriotic addresses, and speeches by presidential candidates on public issues. 92 S. Ct. at 2222, 2233-34. Nor does the fact that alternative areas for communication were available in *Lloyd* distinguish that case from this one. Respondents in this case have failed to show that other means of communication are not available to them; they also have failed to show that their views are not being presented in the broadcast medium. See CBS Br. 36-38 and pp. 9-11, *infra*.

[10] 92 S. Ct. at 2229.

[11] DNC attempts to undermine the private character of broadcast licensees by emphasizing their use and dominion over a "public" resource—the airwaves. DNC Br. 71-72. The concept of the airwaves as a publicly-owned resource is a rather metaphysical one that has been of little relevance in resolving specific legal questions. See, *e.g.*, Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 783 (1972); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 153 (1967). To concede broad federal regulatory authority over radio as an instrumentality of commerce does not imply the existence of property rights in the United States or in the public at large. The Communications Act nowhere states that such property rights exist, but merely requires licensees to waive claims to the use of the ether "as against the regulatory power of the United States." 47 U.S.C. § 304. The quoted phrase was deliberately inserted in the 1927 Radio Act to make it clear that there was no assertion of government or public ownership of the airwaves. See 68 CONG. REC. 2869-70 (1927) (remarks of Sen. Dill); *id.* at 2872 (remarks of Sen. Watson).

In any event, whatever the legal character of the airwaves, the essential point is that Congress chose to exercise its powers over this resource, not by creating a governmentally owned or financed

Thus, the *Moose Lodge* and *Lloyd* decisions reinforce the showing in our opening brief that the entire foundation of respondents' constitutional argument—state action—is built on quicksand.[12]

B. Respondents Have Failed To Establish the Existence of or Need for a First Amendment Right To Purchase Advertising Time for Partisan Announcements.

We have shown in our opening brief how the existing scheme of broadcast regulation, centering around the fairness doctrine, promotes the paramount First Amendment interest of the public in being informed on public issues, and fosters robust and vigorous debate.[13] Respondents, however, contend that this system is constitutionally insufficient, and argue that there is an independent First Amendment interest in self-expression that is not now being served.[14]

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system of broadcasting, but by permitting the growth, on a licensed basis, of a system of privately owned stations with programming decisions made by licensees, not the government. Compare *Moose Lodge, supra.*

[12] A recent decision by the United States District Court for the Central District of California is directly on point on the state action issue. In *Smothers* v. *CBS*, C.D. Cal. No. 69-1898-AAH, decided Sept. 18, 1972, the court dismissed a complaint charging CBS with violating the plaintiffs' asserted First Amendment rights by engaging in "censorship" of programs prepared for broadcast. The court concluded that "despite the fact that CBS is regulated by the Commission . . ., CBS is not a branch of any government and its activities are not governmental in character."

[13] CBS Br. 35-38. As we noted, the Commission is currently in the process of completing a comprehensive inquiry designed to ensure that the fairness doctrine is achieving these goals. See *Notice of Inquiry*, Docket No. 19260, 30 F.C.C.2d 26 (1971).

[14] DNC Br. 35-46; BEM Br. 24-40. DNC also makes the presumptuous argument that as a major political party it has special rights under the First Amendment to buy broadcast time. DNC Br. 59-62. This argument is utterly without foundation. No one disputes the important role of political parties in the United States—a role that

In so arguing, respondents ignore the essential teachings of this Court's landmark decisions in the broadcast field: that the unique characteristics of broadcasting—the inherent scarcity of frequencies and the inherent limitations of time in the broadcast day—require the subordination of individual interests in self-expression to the central interest of the public in being informed on public issues, and thus preclude the creation of a constitutional right of individual access. In broadcasting, "freedom of utterance is abridged to many who wish to use the limited facilities of radio" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943)), and "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969).

Moreover, respondents have not shown that the existing system fails to afford opportunities for self-expression at the same time that it serves the paramount interest of the viewing and listening public in access to information.

True, licensees such as CBS believe that the public can most effectively be informed through the application of journalistic judgments to determine what issues, views

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may have a variety of implications for public policy. This is reflected in Section 315 of the Communications Act and the policies of licensees like CBS, who regularly sell large amounts of time to candidates and political parties. But we are aware of no decision of this Court holding that the First Amendment requires that political parties be favored over other groups or persons, and DNC cites none. As the Court of Appeals for the District of Columbia Circuit recently stated in rejecting a claim by DNC of a First Amendment right for it to respond to Presidential broadcasts:

> "DNC feels it is obligated to inform the nation of the viable options open to it. Should this be DNC's manifest destiny we can find no reason to compel the networks to assist it. Can it be said that others are not equally capable of the task?" *Democratic National Committee* v. *FCC*, —— U.S. App. D.C. ——. 460 F.2d 891, 910 (1972), *petition for cert. pending* (Oct. Term 1972, No. 71-1405).

and spokesmen should be presented. This is the essence of the function of the press in both print and broadcast media. As Judge Learned Hand once put it:

> "News is history; recent history, it is true, but veritable history, nevertheless, and history is not total recall, but a deliberate pruning of, and calling from, the flux of events. . . . In the production of news every step involves the intervention of some news gatherer, and two accounts of the same event will never be the same. . . . A personal impress is inevitable at every stage; it gives its value to the dispatch, which without it would be unreadable." [15]

But this does not mean—as respondents would have it [16]—that CBS and other licensees are presumptuous "paternalists" who invariably seek to filter all views through themselves.[17] In making these allegations, respondents ignore the fact that the Commission's fairness doctrine requires licensees to cover issues in a robust and vigorous way and to present directly the views of partisans. As the Commission emphasized in its opinion in the *DNC* case, licensees may not eschew controversy, but must cover all significant public issues; they may not exclude particular views because they disagree with them; they must present "representative community views and voices" and "some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commit-

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[15] *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y. 1943), *aff'd*, 326 U.S. 1 (1944).

[16] DNC Br. 37, 41-42; BEM Br. 34.

[17] Contrary to respondents' suggestion, CBS has never claimed journalistic infallibity. For example, in the case of the "Selling of the Pentagon" broadcast dwelt on by DNC at length (DNC Br. 42-44), CBS presented extensively and directly the views of critics of that broadcast. See *Letter to Hon. Harley O. Staggers*, FCC 71-643, June 21, 1971.

ment' that debate on public issues should be uninhibited, robust, and wide-open." [18]

There is no basis in this record for concluding that the existing system of broadcast regulation fails to ensure adequate opportunities for self-expression and robust debate. Neither DNC nor BEM has at any time in these proceedings shown that licensees are in fact eschewing controversy or failing to present partisan voices on public issues. To the contrary, as we discussed in our opening brief, the record shows, for example, that CBS devotes substantial time to presenting directly the views of Democratic spokesmen, anti-war spokesmen, and other partisans.[19] In sum, to the extent that the record speaks to this question, it fully supports the Commission's conclusion that the present system is one which ensures vigorous debate and the presentation of partisan views.

Instead of relevant facts, respondents rely upon criticism of the broadcast medium unrelated to the issues in this case.[20] DNC's efforts in this regard are particularly misplaced. It appears to rely primarily on charges that licensees in general, and CBS in particular, have engaged in inaccurate or misleading journalistic prac-

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[18] App. 259, citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

[19] CBS Br. 36-38. This conclusion is highlighted by the extensive coverage of the national conventions of the Democratic and Republican Parties provided by CBS and the other networks. The amount of "direct access" afforded party spokesmen through broadcast of convention proceedings was enormous. In its four days of coverage of the Democratic National Convention, the CBS Television Network provided 36 hours and 42 minutes of coverage, a substantial portion of which consisted of direct presentation of convention proceedings. Taking into account coverage of directly related events such as the hearings of the Democratic platform committee, Senator McGovern's speech on his new Vice Presidential choice, and the "mini-convention" held by DNC to select a new candidate for Vice President, the total coverage came to 43 hours and 23 minutes.

[20] DNC Br. 40-44; BEM Br. 34-35.

tices.[21] Apparently DNC is dissatisfied with broadcast coverage of news and public affairs and believes the public would be better served by paid presentations prepared by it and other partisans. The distrust and suspicion of journalism expressed by DNC is, of course, nothing new in American history.[22] It merely points up, we submit, the vital historic role of the press as critic of political institutions and the importance of keeping the press free from governmental restraint and interference. It is ironic that DNC, in invoking the First Amendment to impose new governmental restrictions on broadcasters, actually relies on the fact that the free broadcast press has been sufficiently robust to draw criticism. DNC's argument serves only to emphasize the inherent threat to freedom of the press presented by the decision below.

C. The Refusal of Broadcast Licensees To Sell Advertising Time for Partisan Announcements Does Not Constitute an Unconstitutional Discrimination Against Speech on Public Issues.

Both DNC and BEM argue that a right of paid access for partisan announcements should be recognized in order to eliminate an alleged unconstitutional discrimination

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[21] DNC Br. 41-44.

[22] Throughout history, Presidents, public officials and party leaders have expressed varying degrees of hostility toward the press. See generally W. SMALL, POLITICAL POWER AND THE PRESS 43-63 (1972). "Jefferson was so vilified by the opposition press that he once suggested that editors categorize the contents of their papers under four chapters: Truths ('The first chapter would be very short'), Probabilities, Possibilities, and Lies." W. RIVERS, THE OPINION MAKERS 5 (1965). Franklin Roosevelt once rejected a proposal to make it a felony for a newspaper knowingly to publish a falsehood by remarking: "I'm trying to spare expenses and I don't want any more prisons!" J. BURNS, THE LION AND THE FOX 346 (1956). More recently, President Kennedy's cancellation of the White House subscription to the New York Herald Tribune and the incumbent Vice President's vigorous criticism of the broadcast and printed press have received wide attention. See T. SORENSEN, KENNEDY 317 (1965); R. EVANS & R. NOVAK, NIXON IN THE WHITE HOUSE 315-17 (1972); W. SMALL, *supra*, at 127-42.

against speech on public issues.[23] They argue that once broadcast licensees "open up" time by selling it to commercial advertisers, their refusal to sell time to partisans on public issues represents unlawful discrimination.[24]

The short answer to this argument is that, even if broadcast licensees were treated as government agencies subject to constitutional restrictions on discrimination,[25] there is no invidious discrimination involved here. In the cases relied upon by Judge Wright and respondents,[26] the transit companies and school newspapers that refused to sell advertising space for partisan messages were under no statutory duty to provide their riders and readers with full and fair coverage of public issues; they had no independent legal responsibility that ensured access to their forum for representative views on such issues.[27] Here, by contrast, broadcast licensees have a special statutory obligation—as well as a responsibility as journalists —to present contrasting views on public issues. Failure to meet this obligation can result in loss of license.[28] The existence and performance of this obligation—which ac-

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[23] DNC Br. 55-57; BEM Br. 14-24.

[24] DNC Br. 55; BEM Br. 18-19.

[25] All the cases relied upon by respondents and the court below in this regard are distinguishable on the ground that they involved government bodies or government-owned entities subject to constitutional limitations. See pp. 4-8, *supra*.

[26] See CBS Br. 21 n.50; App. 475.

[27] Indeed, in the transit cases, the refusal to sell advertising space for discussion of controversial issues resulted in a total exclusion of such speech from the forum.

[28] See *Brandywine-Main Line Radio, Inc.* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1181, decided Sept. 25, 1972). See also *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C.2d 283, 298 n.24 (1970) (holding that there is no obligation to sell time to spokesmen for views opposed to the Administration's Vietnam War policy but requiring the networks to provide additional time free of charge under the fairness doctrine for expression of such views).

tually places controversial speech in a preferred position—ensures that a broadcaster who declines to sell time for partisan announcements will in no way be discriminating against speech on public issues. His differing treatment of commercial advertisements and discussion of controversial issues is clearly reasonable in light of the distinction between the two under the First Amendment[29] and the regulatory scheme.[30]

Thus, there is no substance to DNC's charge that the refusal of broadcasters to sell time for partisan announcements constitutes a "total ban" on the use of the medium for communication of ideas.[31] So, too, the broadcaster's door is not, in BEM's misleading metaphor, "open" to speech on mouthwash and beer but "slammed shut" against speech about "hunger, consumer exploitation or war."[32] To the contrary, the broadcaster is under no legal obligation to carry any advertisement for mouthwash or beer.

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[29] See *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).

[30] In support of their "discrimination" argument respondents also rely on two recent decisions of this Court striking down municipal ordinances which permitted labor picketing of schools, but forbade all other forms of peaceful picketing. *Police Department* v. *Mosley*, —— U.S. ——, 92 S. Ct. 2286 (1972); *Grayned* v. *City of Rockford*, —— U.S. ——, 92 S. Ct. 2294 (1972). These cases simply are not in point. They involved discriminatory exclusions of one form of protected speech. A picket sign which contained a message relating to a labor dispute was permissible, but one containing a message relating to some other issue was not permitted.

As discussed in the text, the broadcast system sanctions no such discrimination. The rationale of the *Mosley* and *Grayned* decisions might conceivably apply (assuming state action) to a licensee who, while presenting spokesmen on the Indochina War over his facility, refused to present any spokesmen on other significant public issues. That licensee, of course, would also be in violation of the Commission's fairness doctrine, and perhaps even be in danger of losing his license. Cf. *Brandywine-Main Line Radio, Inc.* v. *FCC*, *supra* note 28.

[31] DNC Br. 48, 51.

[32] BEM Br. 16.

But he is obligated, under the fairness doctrine, to present contrasting views on significant public issues like hunger, consumer exploitation and the war.

D. Respondents Have Not Rebutted the Showing by Petitioners that a Right of Paid Access Would Interfere with the Public's Interest in Being Informed, Favor the Affluent, and Lead to a Major Increase in Government Regulation of Speech and the Press.

Respondents have failed to come to grips with the fundamental difficulties and dangers inherent in a regulatory scheme requiring a right of paid partisan access.

Respondents belittle the claim that the court of appeals' decision would lead to significant distortions in the presentation of public issues, suggesting that licensees will retain adequate discretion to ensure that this will not occur.[33] This suggestion is patently inconsistent with respondents' argument that the existing system is constitutionally deficient because it affords such discretion to licensees in the coverage of public issues. The suggestion also flies in the face of the court of appeals' decision, which rejects licensee discretion in this critical area. Judge Wright made clear that licensees cannot refuse to sell advertising time on the ground that the issue to be discussed is trivial; that there are significant issues more deserving of coverage; that similar or identical viewpoints have already been presented without charge; or that the issue has already been fully and fairly treated.[34] In the absence of such discretion, a system of paid access can only produce haphazard results and frustrate the licensee's efforts to achieve overall fairness.

Moreover, respondents fail to answer petitioners' argument that a system of paid partisan access will favor

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[33] BEM Br. 53-55; DNC Br. 65.

[34] App. 469, 471-73, 477, 485.

the affluent.[35] This is not a problem that can be solved by application of the fairness doctrine to require that replies be presented whether or not persons seeking to reply are able to pay.[36] The point here is that the new constitutional right established by the court below is one that can be exercised only by those with the wherewithal to purchase time; and even if the fairness doctrine continues to apply, it is those who purchase time who will, as the Commission aptly put it, set the agenda for discussion. Such governmentally compelled discrimination in favor of the affluent can hardly be squared with the policies of the Constitution.[37]

In this connection, it is important to bear in mind that commercial advertisers would be major beneficiaries of a paid access system. CBS and many other licensees now follow a policy designed to exclude from commercial advertising the presentation of views on public issues.[38] Under the court of appeals' holding—that those who wish to present paid partisan announcements must be given access on the same footing as commercial advertisers—it is difficult to see how such a policy could be maintained. The result could well be a veritable flooding of the airwaves with the presentation of the editorial views of commercial advertisers—who can afford to purchase substantial numbers of advertising spots—on a variety of controversial issues of special concern to them. The resultant distortion of the agenda for discussion of controversial issues would be enormous.

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[35] App. 263. BEM ultimately concedes that the result it seeks "might result in some advantages to the affluent." BEM Br. 50.

[36] Indeed, both respondents appear to concede that if broadcasters are to be compelled to sell advertising time for partisan announcements, it might well be inappropriate and unreasonable to require that opposing views be presented without charge. DNC Br. 65; BEM Br. 58-59. This is only realistic. See CBS Br. 43 n.96.

[37] See CBS Br. 44.

[38] CBS Br. 41.

Finally, under the court of appeals' decision, government intervention—through Commission and court decisions—in the process of determining who should be heard, how often, and on what issues would be more frequent and more pervasive. After all, even where a First Amendment right is "abridgeable," someone must decide whose right will be abridged and whose will not, and the extent and nature of the abridgement constitutionally permissible in a given case.

Respondents do not seriously dispute that the decision below would lead to more government intervention. Indeed, BEM asserts that this "is a development . . . to be anticipated and welcomed." [39] Their response to this point, basically, is that it need not be a matter of concern since the Commission and the courts are already supervising licensee decisions under the fairness doctrine.[40] On this theory, of course, any new governmental intervention in the process of broadcast news coverage could be sustained on the ground that it involved only an increase in the total amount of intrusion already permitted.

In any event, the role of the Commission and the courts in supervising licensee decision-making under the fairness doctrine provides no precedent for what respondents seek here.[41] The justification for governmental in-

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[39] BEM Br. 60.

[40] DNC Br. 66-67; BEM Br. 59-61.

[41] Contrary to DNC's suggestion (DNC Br. 45, 66), CBS did not argue in *Red Lion* that the fairness doctrine was either unworkable or unconstitutional. The quotation from CBS' brief cited at page 66 of DNC's brief referred to the personal attack rules, *not* the fairness doctrine. As CBS emphasized at the outset of its brief in *Red Lion*, one of its major purposes was "to show that this case [*Red Lion*] does not involve the constitutionality of the Commission's general fairness doctrine, and that the issues raised by the general fairness doctrine differ distinctively from those presented by the personal attack rules." Brief for Respondent Columbia

tervention that exists in the case of the fairness doctrine —the need to ensure that the public interest in being fully and fairly informed is vindicated—is not present. Moreover, under the fairness doctrine governmental intervention is materially less pervasive.[42] The licensee is judged on his overall performance and is allowed latitude to make reasonable judgments as to who shall be heard and on what issues. With the narrow exception of the personal attack and political editorializing rules, there is no requirement that any particular spokesman be presented. Under the court of appeals' decision in this case, by contrast, every person, organization or corporation whose request to purchase time was rejected by a licensee would have a claim that his or its constitutional rights had been violated.

E. There Is No Basis for DNC's Attempt To Extend the Court of Appeals' Holding to Program Time.

DNC's attempt to suggest that the opinion of the court below requires the sale of time for program-length presentations by partisans as well as the sale of advertising time for partisan announcements[43] is baseless. It is noteworthy that none of the other parties in this case, including respondent BEM, suggests that the decision below applies to program time. Indeed, DNC itself, in urging this Court to deny certiorari in this case, construed the opinion as limited to advertising time.[44] And the Commission,

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Broadcasting System, Inc., No. 717, Oct. Term 1968, p. 2. See also *id.* at 54-62, showing how the fairness doctrine, because of the discretion it affords licensees, represents a form of regulation which does not unduly intrude the government into journalistic judgments on a day-to-day basis.

[42] See generally *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1247 (1949); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964).

[43] DNC Br. 8 n.6.

[44] Brief for Respondent Democratic National Committee in Opposition, Nos. 71-863, 71-864 and 71-866, pp. 6, 10, 15.

in a subsequent decision,[45] so read the court of appeals' decision.

The central rationale of the court of appeals' opinion was based on the alleged discrimination created by the sale of spot announcement time to commercial advertisers. That rationale—even if it were valid—would have no application to program time, since broadcast licensees are forbidden by Commission policy to sell "program-length commercials." [46] Moreover, the court of appeals recognized that requiring the sale of program time would intrude substantially and directly on the journalistic prerogatives of broadcasters, and accordingly was careful to note that its opinion had no application to program time. This is reflected throughout the opinion, and at one point was stressed in the following terms:

> "It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. *In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different.* In news and documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong. The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests." (Emphasis added.)[47]

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[45] *Committee of One Million Against Admission of Communist China to the United Nations*, 33 F.C.C.2d 545 (1971).

[46] *E.g., Columbus Broadcasting Co.*, 18 Pike & Fischer R.R.2d 684 (1970); *Multimedia, Inc.*, 18 Pike & Fischer R.R.2d 687 (1970).

[47] App. 464-65. See also App. 468 n.32, 468-69, 472, 482-83 ("Broadcasters would retain full latitude to control the content of their pro-

Any holding that there is a First Amendment right to purchase program time for partisan presentations would magnify immensely all the problems already inherent in the court of appeals' holding. In a limited-time medium, it would become impossible to maintain journalistic standards of newsworthiness and fairness or to assure the public access to discussion of the *significant* issues of the day. As Judge Wright apparently recognized, such a holding would represent a direct assault on the central journalistic function of the broadcast medium.

We submit that DNC's attempt to stretch the court of appeals' opinion to cover program time as well as advertising time serves merely to point up the inherent problems in holding that there is any individual First Amendment right of paid access to the broadcast medium. It is easier to create a new constitutional right than to contain it once created. If the broadcast licensee is stripped of his trustee responsibility as to advertising time, it is tempting to seek the same result—as DNC now does—as to program time. "Rights" today reassuringly labeled limited and "abridgeable" can tomorrow easily be extended until the licensee is left with none of the responsibilities and functions he now has under the Communications Act and this Court's decision in *Red Lion*.

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gramming. Their editorial control over nonadvertising time would not be disturbed whatever. All that would be affected is their allocation of advertising time. . . .")

II. CONTRARY TO DNC'S CONTENTION, THE COMMUNICATIONS ACT DOES NOT REQUIRE BROADCASTERS TO SELL TIME FOR DISCUSSION OF CONTROVERSIAL PUBLIC ISSUES.

DNC argues that this Court can avoid the difficult constitutional issue by holding that the Communications Act requires broadcasters to sell time for discussion of controversial public issues.[48] Notably, BEM does not join in this statutory claim.[49]

The Commission squarely rejected DNC's statutory argument as running "counter to the statutory language and the legislative history."[50] In *Red Lion* this Court stressed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."[51] There are no such "compelling indications" in this case. As we now discuss, the statutory language and legislative history of the Act and prior Commission decisions confirm the correctness of the Commission's conclusion, and no amount of deference to the principle of avoiding difficult constitutional issues can justify a different interpretation.[52] Indeed, even the court of appeals—which found that an "abridgeable" constitutional right of access would be consistent with the Communica-

[48] DNC Br. 17-34.

[49] BEM relies entirely upon constitutional arguments in its brief to this Court, although it discusses a number of statutory issues at some length in connection with these contentions. BEM Br. 40-49, 64-68.

[50] App. 260.

[51] 395 U.S. at 381.

[52] This Court has repeatedly held that "avoidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion." *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933). See also *Aptheker* v. *Secretary of State*, 387 U.S. 500, 515 (1964); *Scales* v. *United States*, 367 U.S. 203, 211 (1961).

tions Act—expressly determined that a decision on non-constitutional grounds "is neither fruitful nor possible here" and found that respondents had failed to present any "compelling evidence" to support their reading of the statute.[53]

A. DNC Is in Error in Suggesting that the Commission Has Here Departed from its Long-Standing Interpretation of the Public Interest Standard of the Act.

DNC rests its argument principally on the remarkable assertion that the Commission's refusal to recognize a statutory right of paid partisan access represents an attempt "to overturn its previously established rule" and an intolerable example of "regulatory inconstancy."[54] As evidence of an alleged "long-standing" Commission recognition of a right of paid access, DNC relies upon five early cases decided before the Commission's definitive articulation of the fairness doctrine in its 1949 *Report on Editorializing*.

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[53] App. 454, 455. Despite the decisiveness with which the court of appeals rejected the statutory right-of-access argument, DNC asserts that the court "found in the Communications Act an alternative basis for its holding." DNC Br. 18. In support of this strained reading of the court's opinion, DNC quotes only the final sentence of the following passage from the decision and conspicuously omits the italicized material:

> "What then must be the 'compelling indications' we are to consider? The ones which seem to us truly 'compelling' involve First Amendment principles. Thus we conclude that *the constitutional question must be faced and is, indeed, the essence of these cases.* Whether our decision is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements 'in light of the First Amendment' matters little." App. 455 (emphasis added).

What the court was saying in the sentence quoted by DNC was not that the fairness and public interest requirements of the Communications Act create a right of paid access independent of the First Amendment, but that they must be read to incorporate any constitutional right which the court might find to exist.

[54] DNC Br. 27.

These decisions lend no support to DNC's contention. Three of the cases—*Sam Morris*, 11 F.C.C. 197 (1946), *Robert Harold Scott*, 11 F.C.C. 372 (1946), and *Homer P. Rainey*, 11 F.C.C. 898 (1947)—do not in any way suggest that there is a right of paid access to the broadcast medium and have absolutely nothing to do with this case.[55] In the other two cases—*United Broad-*

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[55] In *Morris*, petitioner charged a licensee and network with selling time for beer and wine commercials while refusing to sell time for the advocacy of abstinence. The Commission warned that such advertising could raise controversial public issues requiring the presentation of contrasting views; but it did not suggest that the Communications Act required licensees to *sell* time for the discussion of abstinence or any other controversial issue.

In *Scott*, the petitioner charged that certain licensees had refused to sell or make available time for the discussion of atheism while simultaneously broadcasting direct and indirect attacks on atheists by various religious groups. Although the Commission severely criticized the licensees for interpreting their public interest obligation to permit them to refuse to broadcast views likely to prove distasteful to their audience, it did not suggest that there was any obligation on the licensee to *sell* time to petitioner or any other spokesman.

In *Rainey*, a candidate for public office complained that certain licensees had published adverse material in newspapers which they owned and at the same time had refused to present the views of the petitioner on their broadcast facilities. The licensees agreed to abandon their policy of limiting candidate appearances and, on this basis, the Commission determined that no sanctions were warranted. In passing, the Commission noted that stations were obligated to afford time for discussion of controversial public issues *either* on a free or paid basis. It did not suggest that a licensee was required to *sell* time for the discussion of controversial issues.

DNC's reliance on several out-of-court settlements as support for its position (DNC Br. 21-22) is similarly misplaced. There is nothing to indicate that these controversies involved requests to purchase time. See L. WHITE, THE AMERICAN RADIO 175 (1947).

In a footnote, DNC also cites the Commission's more recent decisions in *City of Jacksonville*, 21 F.C.C. 334 (1956), and *Loyola University*, 12 Pike & Fischer R.R. 1017 (1956). DNC Br. 24 n.28. Both cases involved a licensee policy of refusing to cover local political campaigns on *either* a free or paid basis in violation of

casting Co., 10 F.C.C. 515 (1945), and *Albuquerque Broadcasting Co.*, 3 Pike & Fischer R.R. 1820 (1946)—the language concerning the purchase of time was dicta which was later repudiated by the Commission.

All five cases were decided between 1945 and 1947, during a time when the basic principles of the fairness doctrine were still developing. At various points during this period, the Commission seemed to emphasize the role of the broadcaster as a conduit rather than as a journalist. A significant step in this direction was the decision in *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940), which barred editorializing by licensees.[56] With the *Mayflower* rule still in full force and effect, the Commission decided *United Broadcasting Co., supra*, the case upon which DNC principally relies.

In *United Broadcasting* petitioners complained that the licensee had applied a policy against selling time for discussion of controversial issues "strictly to those with whom the management . . . disagree[d] . . . and loosely or not at all with respect to others." [57] The Commission approved an agreement between the parties under which the station undertook to make time available for the discussion of issues "primarily on a sustaining basis" and to maintain balance among various points of view.[58] The Commission rested its approval of this agreement

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the public interest obligation to provide adequate coverage of issues of significant importance to the community. As in *Morris, Scott*, and *Rainey*, the Commission nowhere indicated that the licensees were required to *sell* time for discussion of controversial public issues. Similarly, in *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959), relied on by DNC (pp. 25-26), this Court did no more than suggest that "political broadcasts" must be carried on a free or paid basis.

[56] See L. WHITE, THE AMERICAN RADIO 176-78 (1947).

[57] 10 F.C.C. at 515.

[58] 10 F.C.C. at 517.

squarely on a fairness doctrine rationale, holding that licensees have a duty "to be sensitive to the problems of public concern in the community and to make sufficient time available, on a non-discriminatory basis, for a full discussion thereof . . . ." [59] Only in dicta did the Commission declare that the public interest prohibited even a uniformly applied ban on the sale of time for discussion of controversial issues.[60]

Whatever importance broadcasters and trade journals ascribed to the dicta of *United Broadcasting*,[61] the Commission itself never regarded it as significant. In its report on *Public Service Responsibility of Broadcast Licensees* (1946) (the "Blue Book"), handed down less than a year after *United Broadcasting*, the Commission listed a number of continuing regulatory problems in the area of public issues discussion, including whether time should be permitted or required to be sold for presenting views on public issues and, if so, "what precautions are necessary to insure that the most time shall not gravitate to the side prepared to spend the most money." [62] Citing *Mayflower* and *United Broadcasting*, the Commission then proceeded to declare:

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[59] *Id.*

[60] 10 F.C.C. at 518.

[61] See DNC Br. 21.

[62] *Blue Book* at 39. The Commission delineated some of the unanswered problems relating to the sale of time for public issue advertising as follows:

> "(1) Shall time for the presentation of one point of view on a public issue be sold, or shall all such presentations of points of view be on sustaining time only?
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> * * * *
>
> (3) If time is also on occasion to be sold for presentation of a point of view, what precautions are necessary to insure that the most time shall not gravitate to the side prepared to spend the most money?
>
> * * * *

[Footnote continued on page 27]

> "The Commission has never laid down, and does not now propose to lay down, any categorical answers to such questions as those raised above." [63]

Obviously, the Commission regarded the dicta in *United Broadcasting* as something less than a definitive interpretation of the public interest requirement of the statute.

The *Blue Book* reflected the Commission's continuing inquiry in the mid-1940's as to the best manner of insuring the full and fair presentation of controversial public issues. It was during this period, less than three months after the issuance of the *Blue Book*, that the Commission decided the final case relied upon by DNC, *Albuquerque Broadcasting Co., supra.* This one and one-half page informal letter ruling involved a request for advice concerning the obligations imposed upon licensees by the sponsorship identification provision of the Communications Act, 47 U.S.C. § 317. As in *United Broadcasting*, the Commission's passing suggestion regarding the right to purchase broadcast time was dicta.

Significantly, during this same period the courts left no doubt as to their understanding of the public interest requirement of the Communications Act. In *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), a case decided just five months after *United Broadcasting*, the court held that recognition of a right on the part of a religious organization to purchase time from a broadcast licensee would be inconsistent with the statute: "It is clear from

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[62] [Continued]

> (18) When a station refuses time on the air requested for the discussion of public issues, should it be required to state in writing its reasons for refusal? Should it be required to maintain a record of all such requests for time, and of the disposal made of them?" *Blue Book* at 39-40.

[63] *Id.* at 40 (emphasis added).

the history and interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC . . . . Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations." [64] See also *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).[65]

The Commission clarified its own position just four years after its *United Broadcasting* decision. In 1949 it issued its landmark *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, a document which this Court has characterized as "the principal summary of [the Commission's] *ratio decidendi* in cases in this area." [66] There, the Commission definitively interpreted the public interest standard of the Communications Act as requiring licensees to cover significant public issues and present contrasting views concerning them.[67] At the same time the Commission stressed that "the foundation stone of the American system of broadcasting" is the "right of the public to be informed, rather than any right on the part of . . . any individual member of the public to broadcast his own particular views on any matter . . . ." [68] The Commission also emphasized the importance of licensee discretion:

> "[O]ur system of broadcasting . . . imposes responsibility in the selection and presentation of radio

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[64] 151 F.2d at 599-600.

[65] See also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Regents of New Mexico College of Agricultural & Mechanic Arts* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900, 906 (10th Cir. 1947); *Pulitzer Pub. Co.* v. *FCC*, 68 App. D.C. 124, 126, 94 F.2d 249, 251 (1937).

[66] *Red Lion, supra*, 395 U.S. at 384.

[67] 13 F.C.C. at 1249.

[68] *Id.*

> program material upon . . . licensees . . . . It is the licensee, therefore, who must select or be responsible for the selection of the particular news item to be reported or the particular local, state, national or international issues or questions of public interest to be considered, as well as the person or persons to comment or analyze the news or to discuss or debate the issues chosen as topics for radio consideration." [69]

The *Report on Editorializing* carefully limited earlier decisions seemingly at variance with these principles. Thus, while holding that the public interest requirement did not bar broadcasters from editorializing, the Commission cited *Mayflower Broadcasting Co., supra*, for the proposition that, in the presentation of news and comment, licensees "must operate on the basis of overall fairness . . . ." [70] The Commission similarly described *United Broadcasting* as a case recognizing the duty of the licensee to make "reasonable provision for the discussion of controversial issues of public importance in the community served, and to make sufficient time available for full discussion thereof." [71] This Court took an identical view of *United Broadcasting* in its *Red Lion* decision, citing the earlier case only for the proposition that "the broadcaster must give adequate coverage to public issues." [72]

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[69] 13 F.C.C. at 1247.

[70] 13 F.C.C. at 1250.

[71] 13 F.C.C. at 1249. The Commission cited the cases of *Sam Morris, supra*, and *Robert Harold Scott, supra*, as decisions simply requiring licensees fully and fairly to cover controversial public issues without regard to the personal views of the licensee or any determination by the licensee as to the possible unpopularity of the views among elements of the listening audience. 13 F.C.C. at 1249-50. The Court of Appeals for the District of Columbia Circuit similarly construed *Morris* in *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 24 n.34, 405 F.2d 1082, 1092 n.34 (1968), *cert. denied*, 396 U.S. 842 (1969).

[72] 395 U.S. at 377.

Since the issuance of the *Report on Editorializing*, the Commission has never interpreted the public interest standard of the Communications Act to require a licensee to sell time for the purpose of discussing public issues. In *Letter to Women's Strike for Peace*, decided Nov. 25, 1965, the Commission squarely rejected a claim of an individual right to purchase advertising time for the presentation of views on controversial issues, finding that such a requirement would be inconsistent with the Communications Act.[73] As stated in *Boalt Hall Student Ass'n*, 20 F.C.C.2d 612, 615 (1969):

> "[T]he cornerstone of the fairness doctrine is not the right of any particular individual or group to speak but rather the public's right to be informed as to all significant points of view relating to an issue of public importance."

Again, in *Letter to Rep. Ottinger*, 18 Pike & Fischer R.R.2d 1031, 1032 (1970), the Commission declared: "A person or group cannot demand that as a matter of right its message be presented over the station's facilities."[74]

The preceding history of administrative and judicial interpretation of the public interest standard of the Communications Act reveals the lack of merit in DNC's assertion that the Commission's holding below constituted "regulatory inconstancy" and a departure from "long-standing practice." Since the repudiation of the early dicta in *United Broadcasting* some twenty-three years ago, and despite a prevalent broadcaster practice of satisfying fairness doctrine obligations without selling time for discussion of controversial issues, the Commission has never intervened to require the sale of advertising time for this purpose.

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[73] See App. 366.

[74] See also *Mrs. Margaret L. Scherbina*, 21 F.C.C.2d 141, 143 (1969); *Democratic State Central Committee of California*, 19 F.C.C.2d 833, 834 (1968); *Mrs. Madalyn Murray*, 40 F.C.C. 647 (1965).

B. The Legislative History of the Communications Act Lends No Support to DNC's Position.

DNC argues alternatively that the Commission's rejection of a right of paid access is inconsistent with Section 326 of the Communications Act, 47 U.S.C. § 326, and the legislative history of the Act generally.[75]

The precise nature of DNC's argument concerning Section 326 is not entirely clear. At times DNC appears to make the novel contention that this provision, specifically directed at protecting licensees from censorship by the Commission, operates against licensees to compel the sale of time for discussion of controversial public issues.[76] Elsewhere DNC seems to argue simply that Section 326, evidencing a "statutory commitment to a system of broadcasting consistent with the First Amendment," somehow buttresses an interpretation of the public interest requirement as creating a right of access.[77] Neither of these propositions withstands analysis.

Section 326 neither directly commands nor indirectly suggests that the refusal of broadcasters to sell time for the presentation of partisan announcements is impermissible. No fair reading of its language, so obviously directed at protecting licensee discretion from governmental intrusion, can ascribe to Section 326 a purpose of restricting the discretion of broadcasters,[78] and the Commission

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[75] DNC Br. 27-34.

[76] DNC Br. 30.

[77] DNC Br. 27-28.

[78] The section provides:

> "Nothing in this Act shall be understood or construed to give *the Commission* the power of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed *by the Commission* which shall interfere with the right of free speech by means of radio communication." (Emphasis added.)

has held specifically that Section 326 does not operate as a limitation upon licensee conduct.[79]

Section 326 of the 1934 Act is a verbatim restatement of the first two sentences of Section 29 of the Radio Act of 1927, a provision which first appeared in the Senate bill.[80] The provision was only mentioned once during the Senate hearings, and never in connection with the question of "private censorship."[81] On the Senate floor, debate concerning the section dealt solely with the extent of protection provided against Commission censorship.[82]

While the House bill contained no specific anti-censorship provision, the problem of possible interference with free speech received considerable attention, principally because of a fear of government censorship. During the course of hearings, Representative Reid expressed apprehension that the Secretary of Commerce would use his licensing authority to influence broadcast programming, but Representative White, draftsman of the House bill, made it plain that the Secretary was not to use his power

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[79] *Letter to Judy Collins*, 31 F.C.C.2d 848 (1970). See also *Letter to Tracy A. Westen*, dated July 19, 1972; *Letter to Rep. Harsha*, 31 F.C.C.2d 847 (1971); *Letter to Albert H. Kramer (Back Alley Theatre)*, 25 F.C.C.2d 705, 707 (1970); *Letter to Rep. Ottinger*, 18 Pike & Fischer R.R.2d 1031 (1970).

[80] *Hearings on S. 1 & S. 1754 before the Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess. 4 (1926); S. REP. NO. 772, 69th Cong., 1st Sess. 4 (1926). As reported to the Senate, the anti-censorship section contained the concluding proviso "except as specifically stated and declared in this act." The conference committee ultimately dropped this clause, evidently on the ground that the Act created no exceptions to the general proposition. See S. DOC. No. 200, 69th Cong., 2d Sess. 12-13 (1927).

[81] *Hearings on S. 1 & 1754, supra*, at 121.

[82] For example, in response to a charge that the bill gave the Commission power to censor anything but religion, Senator Dill, a principal architect of the legislation, responded that the bill expressly prohibited Commission censorship of any kind. 67 CONG. REC. 12615 (1926).

for such a purpose.[83] On the House floor, Representative White again felt compelled to reassure members that, even without a specific anti-censorship section, the Secretary would have "no power at all" to interfere with broadcasters' freedom of speech.[84]

To be sure, Congress had before it several proposals to limit the programming discretion of broadcasters. Thus, an earlier version of the House bill contained a provision giving the Secretary of Commerce power to establish a system of priorities for the selection of programming.[85] Representative White omitted the section from his substitute bill for fear that it would provide government with a power "akin to censorship." [86]

The most far-reaching proposals presented to Congress to eliminate the threat of "private censorship" were those which would have treated broadcasters as common carriers by forbidding them to discriminate in the sale of time for discussion of public issues. Both Secretary of Commerce Hoover and Representative Davis, upon whose statements DNC so heavily relies, were principal proponents of such treatment.[87] Congress specifically re-

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[83] *Hearings on H.R. 5589 before the House Committee on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 26 (1926).

[84] 67 CONG. REC. 5480 (1926).

[85] *Hearings on H.R. 5589, supra*, at 39-40.

[86] *Id.*

[87] Following his remarks concerning the alleged dangers of private censorship (see DNC Br. 28), Secretary Hoover declared: "Radio communication . . . is a public concern impressed with a public trust, and to be considered primarily from the standpoint of public interest *to the same extent and upon the basis of the same general principles as our other public utilities.*" Quoted at 67 CONG. REC. 5484 (1926) (emphasis added). Representative Davis quoted these remarks of Secretary Hoover on the floor of the House and then acknowledged: "That is all I am asking. I am asking that the radio interests that are engaging in the business for profit or hire

jected this common-carrier proposal,[88] and the statements of its proponents—whatever applause they may have received[89]—can hardly serve as a guide to Congressional intent. As this Court stated in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951): "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."[90]

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be treated in this legislation as public utilities and regulated accordingly." 67 CONG. REC. 5484 (1926) (emphasis added).

DNC also quotes a statement by Representative Free to the effect that broadcasters only sought the right to edit out slanderous and seditious statements. DNC Br. 29. While this may have been Mr. Free's interpretation of the testimony given during the hearings, other members on the floor immediately and vigorously contested such a reading. 67 CONG. REC. 5491 (1926) (remarks of Rep. Celler). See also 68 CONG. REC. 2567 (1927) (remarks of Rep. Davis). Moreover, the hearing transcript, quoted by Representative Davis on the House floor, failed to support Mr. Free's view. 67 CONG. REC. 5484 (1926).

[88] 67 CONG. REC. 12501-05 (1926); 68 CONG. REC. 2570-80 (1927).

While generally rejecting a common-carrier approach, Congress did adopt Section 14 of the Radio Act which permitted the Commission to revoke a station's license upon a finding by the Interstate Commerce Commission that the licensee was "guilty of any discrimination either as to charge or as to service." 44 Stat. 1168 (1927). In response to a complaint by Representative Davis that such a section would be largely meaningless in view of the ICC's declared intention not to exercise jurisdiction over broadcasting, Representative Scott, leader of the House conferees, refused to strengthen the provision, arguing that even in so limited a form it came dangerously close to a governmental abridgement of free speech. 68 CONG. REC. 2567 (1927). Davis' prediction that the section would be ineffective proved accurate—in *Sta-Shine Prods. Co.* v. *Station WGBB*, 188 I.C.C. 271 (1932), the ICC held that it lacked jurisdiction over broadcasting—and Congress deleted the provision when it adopted the 1934 Act.

[89] See DNC Br. 29.

[90] See also *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 639-40 (1967); *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964); *Mastro Plastics Corp.*

Looking to the proponents of the bill ultimately enacted as the Radio Act, we find that, contrary to DNC's contention,[91] Congress rejected the common-carrier proposals because it believed they would unduly restrict the discretion and responsibility of licensees. Thus, in arguing against adoption of a common-carrier provision, Senator Dill, the major architect of the Senate bill, stated:

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v. *NLRB*, 350 U.S. 270, 288 (1956) ("An unsuccessful minority cannot put words into the mouths of the majority and thus indirectly amend a bill.")

[91] According to DNC, the original inclusion of the common-carrier provision in the Senate bill merely reflected the opinion of some Senators that such a clause was required to give Congress constitutional power to regulate radio transmissions and to indicate that the Interstate Commerce Commission would retain limited jurisdiction over certain aspects of broadcasting. DNC suggests that the rejection of the common-carrier provision simply shows that Congress as a whole regarded the provision as unnecessary for either purpose. DNC Br. 32.

Such an interpretation of the legislative history of the common-carrier provision is, in fact, highly misleading. Although certain members of Congress may have believed that a common-carrier section was necessary to establish Congress' regulatory power or to stress the continuing role of the ICC, the debate in both Houses on the subject centered almost entirely on the question of whether the common-carrier provision was needed to curb "private censorship." 67 CONG. REC. 5483-84 (remarks of Rep. Davis), 5491 (remarks of Rep. Free), 12501-04 (remarks of Sen. Dill), 12504-05 (remarks of Sen. Howell) (1926); 68 CONG. REC. 2567 (remarks of Rep. Scott), 2571-73 (remarks of Rep. Davis) (1927). See also p. 32, *supra*.

Equally unfounded is DNC's contention (DNC Br. 32-34) that Congress' rejection of the common-carrier provision indicated merely a concern that the common-carrier approach would turn the airwaves over entirely to commercial advertisers. Thus, for example, DNC relies upon a statement by Senator Broussard expressing fear that adoption of the common-carrier provision would result in a domination by commercial advertisers. DNC Br. 32-33. But Senator Howell, a common-carrier proponent, immediately responded that the common-carrier proposal was not designed to have any impact upon the relationships between broadcasters and commercial advertisers: "I call the attention of the Senator from Louisiana [Mr. Broussard] to the fact that, so far as advertisements are concerned, under this bill . . . radio is not to be deemed a common carrier." 67 CONG REC. 12504 (1926).

> "[U]nder the common-carrier provision a radio station is compelled to take *any kind of broadcasting that anybody wants to offer*, which would mean that it would take anybody who came in order of the person presenting himself and would be compelled to broadcast for an hour's time *speeches of any kind they wanted to broadcast.*
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> When we recall that broadcasting today is purely voluntary, and the listener-in pays nothing for it, that the broadcaster gives it for the purpose of building up his reputation, it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept *anything* and everything that was offered so long as the price was paid." [92]

Similarly, Representative Scott, the leader of the House conferees, argued against a common-carrier approach on the ground that Congress would be "trespassing very closely to sacred ground [in attempting] . . . to control the right of free speech" of broadcasters.[93] Thus, in refusing to adopt the common-carrier proposals, Congress was deliberately rejecting a system of paid partisan access such as that imposed by the court of appeals in this case. Congress made its rejection of a system of paid access even more explicit in 1934 when it enacted Section 3(h) of the Communications Act, 47 U.S.C. § 153(h), declaring that a broadcaster "shall not . . . be deemed a common carrier." [94]

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[92] 67 CONG. REC. 12502 (1926) (emphasis added).

[93] 68 CONG. REC. 2567 (1927).

[94] See CBS Br. 29, 32. The very remarks which DNC quotes from the legislative history of the Communications Act (DNC Br. 30) actually demonstrate that the Congressional concern regarding censorship related to the danger of government pressure upon broadcasters. Representative Culkin's comments concerning the importance of Section 326 as a guarantee of free speech were made in response to complaints that broadcasters had refused to present the views

This Congressional intent is clearly confirmed by provisions that the Congress wrote into Section 315 of the statute. Prior to its amendment earlier this year, Section 315(a) of the Communications Act, like the analogous provision of the Radio Act, required licensees to afford all legally qualified candidates equal opportunities to utilize station facilities, but provided: "No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." It is inconceivable that the Congress would have denied rights to purchase time to candidates if it believed that the Act conferred such rights on the general public.[95]

The amendment of Sections 315 and 312 by the Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), further confirms Congress' intention not to confer any general rights of paid access to the broadcast medium. In this legislation, Congress revised the original proviso to Section 315 and amended Section 312 to authorize the Commission to revoke the license of a station which willfully or repeatedly fails "to allow reasonable access to or permit purchase of reasonable amounts of time" by candidates for federal office.[96] The enactment of this limited

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of opponents of the New Deal out of fear that the Radio Commission, at the behest of the Democratic administration, would refuse to renew their licenses. 78 CONG. REC. 10327-28 (1934). His comparison of the anti-censorship provision with the Magna Carta plainly indicates that it was regarded as imposing a restraint upon governmental interference.

[95] The additional proviso to Section 315 that licensees "shall have no power of censorship over the material broadcast under the provisions of this paragraph" further undermines DNC's argument that Section 326 operates to prohibit "private censorship." Obviously, if Section 326 barred licensee censorship generally, the narrowly limited prohibition in the proviso to Section 315 would be pure surplusage.

[96] Section 103(a)(2). The Senate bill created a right of reasonable access for all candidates, but the House conferees forced its restriction to candidates for federal office. See S. REP. NO. 580, 92d Cong., 1st Sess. 22 (1971); H.R. REP. NO. 752, 92d Cong., 1st Sess. 22 (1971).

provision again demonstrates the Congressional view that the Act creates no general rights of paid access to the air.[97]

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[97] See also CBS Br. 7 n.12, 30-31 n.72.